No. 15061

United States
COURT OF APPEALS
for the Ninth Circuit

WILLIA NIUKKANEN, also known as William Niukkanen, also known as William Albert Mackie,
Appellant,

vs.

JOHN P. BOYD, District Director, Immigration and Naturalization Service, United States Department of Justice, JOHN WILSON, Officer in Charge, Immigration and Naturalization Service Office,
Appellees.

APPELLANT'S OPENING BRIEF

Appeal from the United States District Court for the District of Oregon

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JURISDICTIONAL STATEMENT

This is an appeal from an Order Dismissing Appellant's Amended Petition for Writ of Habeas Corpus and Complaint for Injunctive Relief to Prevent Agency Action.

The jurisdiction of the District Court was invoked under Title 28, United States Code, Section 2241, 62

Stat. 964, and Title 5, United States Code, Section 1009, 60 Stat. 237.

The jurisdiction of the Court of Appeals for the Ninth Circuit is invoked under Title 28, United States Code, Section 2253, 62 Stat. 967, and Title 28 United States Code, Section 1291, 62 Stat. 929.

The validity, and the interpretation of statutes of the United States are involved, namely: The Act of October 16, 1918, 40 Stat. 1012, as amended by Section 22 of the Internal Security Act of 1950, 64 Stat. 1006, 1008, now Section 1251(a)(6)(c), Title 8, United States Code.

Reference is made to the pleadings, the Petition (Tr. Rec. 5-16),* the Amended Petition (Supplemental Transcript of Record), the Writ of Habeas Corpus (Tr. Rec. 16), and the Return to the Amended Petition (Tr. Rec. 18-20). The Order dismissing the Amended Petition appears at page 23-24 of the Transcript of Record.

STATEMENT OF THE CASE

Appellant is an alien, having been born in Finland, November 24, 1908. He entered the United States in 1909 and has resided in this country continuously since then. He is duly registered under the Alien Registration Act (Tr. 4, 5).

* As used in this brief, the reference (Tr.) refers to the transcript of the hearing before the Immigration Service (Exhibit 1), and (Tr. Rec.) refers to the transcript of the hearing in District Court which is printed as part of the record on appeal.

Appellant and his parents have resided in Portland, Oregon for about 33 years where Appellant follows the trade of painting. His father is a tailor who works only four or five days a week because of ill health (Tr. 174-5). His mother suffers from diabetes and impaired eyesight (Tr. 173-174) and Appellant renders financial and other aid to his parents (Tr. 173, 175). His mother is aged 78 and his father is a couple of years older (Tr. 171).

Appellant is the only surviving son of his parents, a brother having been killed during World War II on a ship near Wake Island (Tr. 172). Appellant himself was drafted in 1944 and served 95 days in the Army, receiving an Honorable Discharge for medical reasons (Tr. 8, 9).

On June 17, 1952, a warrant for the arrest and deportation of Appellant was issued by John P. Boyd, District Director of the Immigration and Naturalization Service and the same was served upon Appellant on or about September 12, 1952. The basis of the warrant was the allegation that Appellant has been a member of the Communist Party of the United States after entry into the United States during the years 1937-39.

A hearing was held before Louis C. Hafferman, Special Inquiry Officer on May 11, 1953 in Portland and thereafter, Mr. Hafferman issued a written decision holding Appellant deportable. A timely appeal to the Board of Immigration Appeals of the Department of Justice was taken and on September 8, 1953, said Board issued an order dismissing the appeal.

On February 2, 1955, purusant to motion of Appellant, a further hearing was held before Mr. Hafferman

as Special Inquiry Officer in reference to Appellant's application for suspension of deportation. Appellant's application was denied and an appeal to the Board was again taken. In an opinion and order dated May 13, 1955, this appeal was dismissed.

On December 13, 1954, Appellant filed a Petition for a Writ of Habeas Corpus and Complaint for Injunctive Relief to Prevent Agency Action in the United States District Court for the District of Oregon, and later, an Amended Petition setting forth the denial of Appellant's application for suspension of deportation. Upon return of the writ and answer to the complaint, a hearing was held in District Court. Thereafter, the Honorable Gus J. Solomon, Judge, entered an order on March 6, 1956, dismissing the complaint, discharging the writ, and remanding Appellant to the custody of Respondent for deportation.

The questions raised by this appeal include the constitutionality of the Act of 1950 under which Appellant was arrested, whether Appellant is a deportable person under that act, and whether the denial of Appellant's application for suspension of deportation was capricious and an abuse of administrative discretion.

SPECIFICATION OF ERRORS

1. The District Court erred in failing to declare unconstitutional the Act of October 16, 1918, as amended by the Act of June 28, 1940, and as amended by the Internal Security Act of 1950, because said act contra-

venes Article I, section 9(3) of the Constitution of the United States, and the First and Fifth amendments to the said Constitution.

2. The District Court erred in finding that Appellant is a person subject to deportation under the above acts in that there was no substantial, probative or reasonable evidence to support a finding that petitioner was a member of the Communist Party of the United States after entry into the United States, or if he was a member, that said membership was more than nominal.

3. The District Court erred in failing to reverse Respondent's denial of Appellant's application for suspension of deportation because said denial was arbitrary, capricious, and an abuse of discretion.

ARGUMENT

SECTION 22 OF THE INTERNAL SECURITY ACT OF 1950 IS UNCONSTITUTIONAL.

1. The Act violates due process of law.

The government seeks to deport Appellant under the following statute:

Title 8, United States Code, section 1251 (a):

> "Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—
>
> "(6) is or at any time has been after entry, a member of any of the following classes of aliens:
>
> "(C) Aliens who are members of or affiliated with (i) the Communist Party of the United States;"

While the Supreme Court has upheld the constitutionality of the statute in question, we believe that the decision in *Galvan* v. *Press,* 347 U.S. 522, 98 L. Ed. 911, 74 S. Ct. 737, was erroneous and will be overruled. We feel compelled to raise the issue at this time, both to preserve our position during the litigation in this case, and because there is presently on the docket of the Supreme Court the case of *Rowoldt* v. *Perfetto,* No. 34, October Term, 1956, which challenges the Court's decision in *Galvan.*

The first objection to the statute is that it is special legislation. Under this law—unique in American jurisprudence—aliens are expelled for membership in a specifically named organization, the Communist Party. Membership in an organization in itself is the basis of classification by the Act; in effect it says that membership alone is the sign of guilt. The Act closes its eyes to motive, scienter, and acts of its victims; mistake and repentance alike fail to redeem those condemned for mere membership.

Not only does the Act offend the deepest sense of fair play by condemning persons because of bare membership in the Communist Party, but for all practical purposes it proposes to expel aliens who might have been members of this organization by a legislative determination that all members of that organization were guilty of thinking, saying, or doing things against the best interests of the nation. Even if Congress were correct in its judgment that the Communist Party is a pernicious organization, it cannot attach its guilt to in-

dividuals by reason of their membership alone. Such a fiat is, on its face, irrational and shocking to the inborn sense of fairness which is, in truth, the essence of due process.

Due process requires that a deprivation of liberty "shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be obtained." Nebbia v. New York, 291 U.S. 502, 525; 78 L. Ed. 940, 54 S. Ct. 505.

Guilt by association—this is the nub of the statute —is a barbarous and uncivilized offender of the standards of the Constitution as expounded by our courts. If an alien commit an act against this nation, if he works as a knowing partner in a conspiracy to harm the land which has accepted him, then let him be punished and deported. But to rule that membership alone in an organization constitutes guilt, without proof that the alien was aware of its evil purposes or an active participant in its subterfuges and plots, is the nadir of decency.

Nearly twenty years ago, the climate of opinion and the state of public knowledge was far different than it is today. Then, thousands joined the Communist party to further social and economic objectives which were espoused, not alone by Communists but also by members of legitimate and long-established political parties. Hundreds of thousands believed the Communist Party to be just another legitimate organization. Intelligent persons who now are "expert witnesses" in our Courts admit to having been "duped" by Communism in the nine-

teen-thirties. Certainly a simple Finnish immigrant laborer might reasonably be excused for accepting the appearance of an organization that fooled so many others.

Nor is the Supreme Court's position sound, taken in *Harisiades* v. *Shaughnessy,* 342 U.S. 580, 96 L. Ed. 586, 72 S. Ct. 512, that substantive due process does not apply to the expulsion of aliens. It is conceded by all that aliens are entitled to procedural due process. So they must be entitled to substantive due process, for there is only one due process clause.

Harisiades is based upon three erroneous assumptions. First, it is said that the alien resides here on sufferance which is not a matter of right but only of permission. But due process protects privileges as well as "rights," such as the privilege of government employment. *Slowchower* v. *Board of Higher Education,* 350 U. S. 551, 100 L. Ed. 405, 76 S. Ct. 497; *Wiemann* v. *Updegraff,* 344 U.S. 183, 97 L. Ed. 216, 73 S. Ct. 215; *United Public Workers* v. *Mitchell,* 330 U.S. 75, 91 L. Ed. 754, 67 S. Ct. 556.

It is also stated in *Harisiades* that the power of expulsion is "largely immune from judicial inquiry or interference" because it is interwoven with the war power, the conduct of foreign affairs, and the maintenance of republican form of government. 342 U.S. 588-89.

But in reality expulsion of aliens is not a tool of foreign policy, and deportation seldom involves negotiations with foreign governments. The mere fact that an alien is the subject of deportation proceedings does

not make the process of deportation a matter of foreign policy any more than the fact that an alien is prosecuted for a crime makes that proceeding into an arm of foreign policy.

Finally, it is implied that the alien brings all of his trouble upon himself by not obtaining citizenship. Even if it were true, this would be no cause for denying him fair play. However, the assumption is fraught with obvious error, for some of the aliens cannot qualify for citizenship because of restrictive laws and restrictive administration of these laws. Moreover, some aliens erroneously believe themselves to be citizens.

The basic attitude which underlies the decisions in both *Galvan* and *Harisiades* is that aliens are here by sufferance and the nation owes them nothing because they contribute nothing in return for the hospitality. This view is as false as it is novel. The Founding Fathers welcomed immigration, and through immigration this nation prospered and developed. Immigrant hands toiled to link the country with railroads, harvest our crops, cut our forests, tend the looms, and make the steel that built America. The continent was settled by immigrants who gave their children to populate the land. The immigrants of today have only remote ties with the countries of their origin. Appellant has lived all but less than a year in America, has married an American citizen and been as a father to his wife's American child. Aliens as a group, and Appellant in particular, are entitled to decent treatment under law. Due process—fairness—is a mighty shield to protect the liberties of all persons in this land.

To deprive the alien of its comfort is to weaken the moral fiber of America.

2. The Act is a Bill of Attainder and an Ex Post Facto Law.

A bill of attainder is "a legislative act which inflicts punishment without judicial trial," *Cummings* v. *Missouri,* 71 U.S. 277, 18 L. Ed. 356. As the Supreme Court said in *United States* v. *Lovett,* 328 U.S. 303, 315: ". . . legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without judicial trial are bills of attainder prohibited by the Constitution."

The Act in question here is clearly within these definitions, and the only basis on which the Court in *Galvan* and *Harisiades* ruled to the contrary is the assertion that "deportation is not punishment."

This view of banishment seems incomprehensible to aliens whose lives have been spent in America, whose roots are here, and whose families depend upon them for care and livelihood. To uproot individuals such as Appellant and to blithely deny that "punishment" is thereby inflicted is to ignore the nature of the particular deprivation being inflicted upon a particular person. *Garner v. Board of Public Works,* 341 U.S. 716, 722. Not all expulsions amount to punishment, but some do, and the Court should examine each case on its merits. The test, as set forth in *Garner,* is whether the deprivation is based upon general standards which are reasonable. If such

standards exist, the deprivation is not punishment; otherwise it is. Inasmuch as the provisions of the Act have no reasonable basis, and are specific in application because they virtually name the individuals to which they apply, "punishment" is inflicted and the Act is a bill of attainder.

That the Act is an *ex post facto* law within the ban of the Constitution is equally clear. It imposes sanctions upon Appellant because he allegedly was a member of the Communist Party at a time when party membership was legal. At the time Appellant was alleged to have been a member, there was no finding that the Communist party advocated violence. As late as 1943, the Supreme Court in *Schneiderman* v. *U. S.*, 320 U.S. 118, 87 L. Ed. 1796, 63 S. Ct. 1333 held that the question of whether the Communist Party advocated violence was an open one. Not until 1950 did Congress make a legislative finding that the Communist Party indeed advocated violent overthrow of the government.

Even if the bare membership of Appellant is conceded *arguendo,* such affiliation took place at a time when Appellant had no notice, judicial or legislative, that his association with Communists was wrongful and that as a result he would be subject to deportation. Since the Act imposes a punishment in the form of banishment, it is an *ex post facto* law and should be struck down as violative of the United States Constitution.

3. The Act violates the First Amendment.

In *Harisiades,* an extensive and unjustifiable interference with freedom of speech was sanctioned. There, the statute required the government to prove that the organization to which the alien belonged advocated violence before he could be expelled.

The Act here goes beyond that considered in *Harisiades.* No finding that the Communist Party, or the alien in question, advocated violence is necessary. Deportation follows from mere membership.

Thus the invasion of freedom of speech permitted in *Harisiades* has been compounded in the 1950 Act. Certainly as applied to this Appellant, the Act constitutes an unjustifiable interference with his right of expression and association and therefore it should be held unconstitutional.

PETITIONER IS NOT A PERSON SUBJECT TO DEPORTATION IN THAT THERE IS NO SUBSTANTIAL, PROBATIVE OR REASONABLE EVIDENCE UPON WHICH TO BASE A FINDING THAT PETITIONER WAS A MEMBER OF THE COMMUNIST PARTY OF THE UNITED STATES AFTER ENTRY INTO THE UNITED STATES, AND THAT IF HE WAS A MEMBER, THAT HE WAS MORE THAN A NOMINAL MEMBER.

1. There is no substantial, probative or reasonable evidence that Appellant was a member of the Communist Party.

The only witnesses called by the government to support its contention that Appellant was a member of the Communist Party of the United States were Walter R. P. Wilmot and Lee Arthur Knipe. Both swore that they knew Appellant as a member of the Communist Party.

With respect to Knipe's testimony, the Board of Immigration Appeals discounted it and used it in an "accumulative" sense only. Certainly his entire testimony taken as a whole is incredible and should be discounted (Tr. 64 ff.).

Wilmot's testimony is also of the sort which does not justify expulsion of the Appellant. He swore that he knew Appellant as a member of the Communist Party, but he was able to recall only one specific closed party meeting at which he saw him, and only one specific occasion when he saw Appellant pay party dues.

The entire testimony of the witness Wilmot is vague and lacking in the specificity which lends the color of

reality to the lifeless corpse of past experience. A veil of ignorance clouds the most important aspects of Wilmot's attempt to tie Appellant into the Communist party. Part of this may be accounted for by Wilmot's admission that he was a heavy drinker during his membership in the party (Tr. 49-50). Another aspect which diminishes the value of Wilmot's testimony is the fact that during the period when Appellant was alleged to be a member of the Communist party, there were a great many groups, such as the Workers Alliance, which were not Communist organizations, but which were subject to varying degrees of Communist influence and infiltration. Appellant, like many other unemployed people during those gloomy years, sought the aid and attended the functions of such organizations without being aware of any sinister connotations which they might have possessed (Tr. 196, 36-38, 28-31). If Wilmot knew Appellant during these years, perhaps it was in connection with Appellant's admitted association with the Workers Alliance, and Wilmot's memory, over the course of seventeen years, has confused the circumstances under which he knew Appellant, if he did (Tr. 200, 203-4).

At the most, Wilmot's testimony can be taken for evidence that Appellant was seen at Communist meetings. But this Court has held that mere attendance at a closed Communist Party meeting is not conclusive evidence of membership in the party. *Bridges* v. *U. S.*, CA-9, 1952, 199 F2d 811 at 835-836.

We believe that a careful reading of the record in this case must lead to the conclusion that there is in-

sufficient evidence of affiliation by Appellant with the Communist party to justify imposing the extreme sanction of deportation.

2. If Appellant was a member of the Communist Party, the evidence is conclusive that he was merely a nominal member, and as such, he is not a person subject to deportation under the Act.

Even if the record in this case should be construed to support the government's contention that Appellant was a member of the Communist Party, nevertheless, his deportation cannot be permitted because there is no evidence in the record to indicate that Appellant was anything more than a nominal member of the party.

Galvan v. *Press,* supra, held that the government was under a duty to prove that an alien which it seeks to deport was more than a nominal member of the Communist Party. The Supreme Court stated the rule as follows:

> "It must be concluded, therefore, that support, or even demonstrated knowledge, of the Communist Party's advocacy of violence was not intended to be a prerequisite to deportation. It is enough that the alien joined the Party, aware that he was joining an organization known as the Communist Party *which operates as a distinct and active political organization,* and that he did do of his own free will." (347 U. S. at 528) (Emphasis added)

The record in this case is devoid of any proof whatsoever that Appellant, even if he was a member of the Party, knew it to be a *political* organization, as distinct from a vehicle to better the *economic* circumstances of

workingmen and the unemployed during the depression. On the other hand, the witness Wilmot swore that the only thing he knew that Appellant actually did in connection with his alleged Communist activity was to help circulate copies of the "Labor New Dealer," a labor paper edited by Wilmot and published by the local C.I.O. (Tr. 19).

The witness Knipe testified that as far as he knew Appellant didn't attend Communist schools or conventions, and didn't distribute any Communist literature (Tr. 70). He also stated that Appellant had never participated in any plots for violent overthrow of the government, and that indeed Appellant didn't seem to advocate such action. Primarily, according to Knipe, Appellant was concerned with problems of unemployment and relief (Tr. 72).

We submit that on this record, it is clear that Appellant was, at most, only a nominal member of the Party. There is nothing to indicate that he was ever aware of the political nature of the Communist party, or indeed, of the Communist movement (Tr. 201-202). All of the evidence indicates that Appellant, far from being a well-read, literate advocate of theoretical Communism, was primarily concerned with "bread and butter" economic issues which affected him personally during the depression.

Under the rule set forth in *Galvan,* we think the government has failed to prove that Appellant knew of the political nature of the Communist Party, if in fact he was a member, and therefore, the case should, at

least, be remanded for Administrative reconsideration. *N.L.R.B. v. Virginia Electric and Power Co.,* 314 U.S. 469, 86 L. Ed. 520, 62 S. Ct. 94; *S.E.C. v. Chenery Corp.,* 318 U.S. 80, 87 L. Ed. 626, 63 S. Ct. 454; *F.P.C. v. Idaho Power Co.,* 344 U.S. 17, 97 L. Ed. 15, 73 S. Ct. 85.

THE REFUSAL TO SUSPEND APPELLANT'S DEPORTATION WAS AN ABUSE OF ADMINISTRATIVE DISCRETION.

After Appellant's appeal to the Board of Immigration Appeals was denied, he applied for suspension of deportation under the provisions of the Act. Suspension was denied by the Board in an Order dated May 13, 1955, and Appellant's Amended Petition for a Writ of Habeas Corpus and Complaint for Injunctive Relief to Prevent Agency Action included the allegation that the denial of suspension of deportation was an abuse of discretion.

The Order of the Board is judicially reviewable under the decisions in *McGrath* v. *Kristensen,* 340 U.S. 162, 95 L. Ed. 173, 71 S. Ct. 224; *Shaugnessy* v. *Pedreiro,* 349 U.S. 48, 99 L. Ed. 868, 75 S. Ct. 591; *Rubenstein* v. *Brownell,* 206 F2d 449 (CA-DC, 1953), affirmed 346 U.S. 929, 98 L. Ed. 421, 74 S. Ct. 319; *Lim Fong* v. *Brownell,* 215 F2d 683, (CA-9, 1954); U.S. ex rel. *Matranga* v. *Mackey,* 115 F. Supp. 45 (DC NY, 1953); *Acosta* v. *Landon,* 125 F. Supp. 434 (DC Cal, 1954).

The issue on review is whether the Board abused its discretion in denying suspension of deportation.

It will be recalled that at the two hearings, there was no evidence that Appellant was anything more than a nominal member of the Communist Party, if indeed membership was proved at all. There was absolutely no evidence that Appellant at any time has engaged in thoughts, deeds, or spoken words hostile to, or subversive of, the United States or its government. There is absolutely no evidence that Appellant ever advocated the use of force and violence.

On the other hand, in the hearing on Appellant's application for suspension of deportation, he testified that he has always been loyal to the United States, and that he never was a member of the Communist Party (Tr. 198, 203, 204, 220).

The opinion of the Board bases its denial of suspension of deportation on the grounds that Appellant failed to submit evidence that he is actively opposed to Communism; that his answers as to his activities both prior to and subsequent to 1940 were "evasive and unresponsive"; and that he refused during cross examination to give the names of persons attending a meeting of the Oregon Committee for the Protection of the Foreign Born.

We do not think that a fair reading of the record sustains the allegation that Appellant was evasive and unresponsive in his answers. In some cases, Appellant did not know the answer to questions put to him, and he then said so. Appellant is not trained in semantics or in debating. He is a relatively uneducated workingman, and it is easy to see that he did not understand some of

the questions put to him, and did not give answers to others which would satisfy a logician. But these defects spring, it seems to us, from ignorance and fear, rather than calculated deviousness.

It is true that Appellant declined to name others in attendance at a dinner meeting of the Oregon Committee for the Protection of the Foreign Born. It is not clear why this information is even material or relevant to the inquiry inasmuch as there was no evidence that the Committee is subversive or connected with Communism. However, the motive of Appellant in refusing to give the names is clear. He did not want to be a "stool pigeon" —that is, give the names and expose those at the meeting to possible pressures similar to those with which Appellant himself, by bitter personal experience, has become familiar. Appellant's motive in refusing to divulge the names was thus an honorable one; it was a type of conduct which has hitherto been considered noble in American ethics.

It is asserted that there is no evidence that Appellant actively opposes Communism. Clearly, Appellant, his wife and his acquaintances established his loyalty to the United States and his abhorrence of force and violence. Apparently the Government would require Appellant to perform some spectacular act or series of acts to make a public display of his opposition to Communism. Perhaps Appellant should have made anti-Communist speeches from a box in a public park to satisfy the vague requirements mentioned by the Board. In any case, the exact nature of the showing of active opposition to Communism which would be acceptable to the Board is nowhere made

clear in the record. We suggest that the absence of any Communistic leanings combined with an upright and moral life—facts clearly demonstrated at the hearings —are sufficient proof of opposition to Communism. Living a good life is, after all, a rather active way to combat Communism or any social or political evil.

Looking at the record as a whole, we think that Appellant was entitled to suspension of deportation inasmuch as his loyalty was demonstrated and the hardship on his family proved and unquestioned, even by the Board. The denial of suspension was an abuse of discretion and should be reversed by this Court.

The case at bar is quite similar to Acosta v. Landon, 125 F. Supp. 434 (DC Cal., 1954). There, the District Court found that there was no evidence "or even suggestion that he ever rejoined the Communist Party, committed any crime or performed any act indicating his moral character was other than good." This language could be applied to Appellant.

The Court in *Acosta* went on to say that the Board denied the application there because his responses to questions were evasive. This, said the Court, is no ground for denying the application for suspension.

The District Court summed up the matter in words which certainly fit the case at bar:

> "As far as Acosta is concerned, it might be said that the terrific price for stupid indiscretion seventeen years ago is justified, but it is cruel punishment for this innocent family. Surely it was just such a situation that Congress had in mind when it enacted the statutory provisions for suspension of deportation."

CONCLUSION

The judgment of the District Court should be reversed and the Government enjoined from deporting Appellant. Even if the Act is constitutional, which we question, there is no evidence that Appellant was a Communist, and certainly no evidence that he was more than a nominal member of the party, if he was a member. Finally, it is clear that even if he is deportable, Appellant should be granted suspension of deportation and the denial thereof was an abuse of discretion which should be remedied by this Court.

Respectfully submitted,

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